No. 92-1402

In The

Supreme Court of the United States

October Term, 1993

C & A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC., C & C REALTY, INC. AND ANGELO CARBONE,

Petitioners,

v.

TOWN OF CLARKSTOWN,

Respondent.

On Writ Of Certiorari To The Supreme Court, Appellate Division Second Department Of The State Of New York

BRIEF OF AMICUS CURIAE COUNTY OF SAN DIEGO, CALIFORNIA IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*

The County of San Diego, California (the "County") owns a solid waste disposal system (the "County Disposal System") that provides solid waste disposal service to its 1,400,000 residents generating 1.6 million tons of solid waste per year. It includes five major operating landfills, a major materials recovery (recycling) facility, and more than twenty closed landfills and burn sites that the County formerly used. The County Disposal System

serves vital health and safety interests and depends on "flow control" for its very existence.

I. In San Diego County, solid waste collection and disposal is a public health and safety concern as basic as police, fire, sewage disposal and water supply.

The safe disposal of garbage, trash and refuse and the prevention of disease, obnoxious and dangerous odors, gases and vermin inherent in solid waste is first and last a matter of public health and safety. California counties and cities collect solid waste themselves, make and enforce sanitary ordinances regarding collection, and, when consistent with public health and safety, grant franchises, contracts or permits to private haulers. This latter practice dates from the 1800's and has long been relied on by the County.

Some California governments utilize their own employees to directly provide collection and disposal services themselves. Public service monopolies in solid waste are also created by controlled privatization as well as by the use of municipal labor forces. California allows waste collection and hauling service, based on public interest findings by local government, to be provided exclusively in a particular district by a private company selected by the government. Hauler rates are bid, negotiated and regulated. Under this public utility model, franchises are awarded to the selected hauler upon terms and conditions satisfactory to the local government. Such public service collection, hauling and disposal monopolies have in fact been established by exclusive franchise for all solid waste generated by most of the cities within San Diego County.

Most basic public services, such as police and fire protection, sewage disposal and water supply, are in fact provided by local government monopolies which exclude competitors. Comparison of sewage disposal to waste disposal helps draw the "flow control" issue most sharply. Sewage disposal is ordinarily provided by backyard septic systems or by sewer lines carrying sewage to a central municipal treatment facility. Local government routinely obligates homeowners to cease using septic tanks, hook up to sewer lines provided by a local government monopoly, and pay all attendant costs. Sewage generators and septic tank pumpers are simply not permitted to disregard sewer line hook-up ordinances, evade the monopoly public sewer system and truck the septic pumpings in interstate commerce. Solid waste flow control differs from sewage waste flow control only in that the dangerous wastes move by truck rather than pipe. Haulage vehicles are the conveyance pipes of solid waste. Waste haulers are pipeline operators providing an essential public service.

II. In San Diego County, fundamental public interests are at stake in solid waste disposal decision making.

Safe waste disposal is a basic public need and legal duty of the County and cities in the region. Private industry has no inherent duty to provide this service. Landfills and other major disposal facilities take years from initial planning to commercial operation, a consequence of siting, environmental review and public approval process timelines. Initial planning and permitting costs exceed tens of millions of dollars. Local government cannot discharge its sanitation duty while ignoring these daunting

time and cost realities. If a facility or landfill were to cease operations for any reason, the County simply cannot produce an instant replacement. This development timeline requires long-term planning with reasonable certainty as to how much trash to plan for. Providing oversized facilities squanders precious resources; providing undersized facilities risks being unable to reliably serve excess tonnages. Flow control avoids either untoward result.

The means by which local government chooses to carry out its sanitation responsibilities vary widely, reflecting local facts and circumstances. Elected officials decide the extent and degree to which private sector companies participate in the public service. Management of solid waste involves an array of assets: collection trucks and containers; transfer stations; recycling facilities; compost plants; waste-to-energy facilities; and landfills. It involves numerous classes of waste: single family residential, multi-family residential, commercial, industrial, construction and demolition, yardwaste and household hazardous waste. Government must decide whether municipal forces or private companies will be utilized, providing which assets, handling which class of waste, and serving which district within the region.

Local government has a vital interest in assuring that waste disposal service is reasonably priced. When disposal costs at private East Coast landfills rose sharply in the 1980's from $30 per ton to $125 per ton, many municipalities developed waste-to-energy facilities costing $80 per ton. Private landfill prices have since come down to $45 per ton. On the other end of the pricing scale, it is not uncommon for below cost, "teaser rate" disposal service to be offered to municipal government in an attempt to

induce government to abandon a long-term public disposal project for short term rate relief. These phenomena clearly indicate a great price elasticity, with fees bearing little relationship to costs; private waste industry can raise or lower prices almost at will to serve immediate ends. Government-sponsored landfill or waste-to-energy facilities provide stable and reasonably priced, controlled disposal service on a long-term basis. The County Disposal System operates at cost and is constitutionally, statutorily and contractually required to do so.

Landfills and other waste disposal facilities are heavily regulated by state and federal government. Local government has important and valid public health and safety interests in disposal facility development independent of these regulations. Regional issues are vital. Allotting disposal facilities among communities in the region is basic to the general welfare of the County. Truck traffic, accidents, air pollution, and noise levels resulting from waste haulage and disposal are all sensitive local, health and safety matters.

California mandates that county and city integrated waste management plans include a schedule under which 25% of the wastestream in counties and cities will be recycled and diverted from landfill by 1994, and 50% by 2000. Local communities elect the means and methods of meeting these environmentally beneficial landfill diversion mandates through combinations of curbside recycling, central waste processing and composting alternatives. However, virtually every such diversion choice involves greater total expense than landfilling. For example, San Diego County's materials recovery facility will cost more than three times as much per diverted ton than landfilling. State and local government have thus

made higher cost choices for disposal based on a disfavoring of landfills and the re-use of materials.

The County faces the practical burden and cost of dealing with closed, formerly private landfills in which the County had no prior involvement. Private operators, until recently, were basically free to operate open, unlined dumps. As the dumps filled, regulations tightened and costs increased, the operators abandoned the dumps, leaving local government to deal with what remained. Recourse to the judgment-proof ex-operator for recoupment of costs is generally unavailing. The County also faces multi-million dollar costs of cleaning up and managing the more than twenty closed landfills and former burn sites which it did operate. These future costs from past sanitation activities are justly the responsibility of current ratepayers; hauler evasion of County flow control would disproportionately burden ratepayers served by non-evading haulers. Finally, local governments are liable as responsible parties under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C.A. § 9601, *et seq.* (*B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2d Cir. 1992)). The County has chosen to build and operate the County Disposal System precisely to monitor and control these risks.

The County's interest in waste disposal monopolization for the protection of the public health and safety is further driven by its concern that the solid waste hauling and disposal industry in its region has been cited for illegal and unethical business practices.

III. San Diego County has made a huge public investment in waste disposal assets in reliance on long settled law giving it the right and responsibility to provide for public sanitation.

The San Diego County Board of Supervisors has formally declared, in a September 1992 policy statement, that waste disposal assets serving the people of San Diego County should be publicly owned, managed or controlled to best serve the public interest. The County's five landfills are publicly owned and controlled. Presently, operations are contracted out and performed by private business. The County's materials recovery facility, expected to be operational in 1993, is privately owned but operated for the exclusive benefit of the County at the County's expense.

Costs of the County Disposal System, in addition to landfill capital and current operating costs and service payments to the materials recovery facility operator, include maintaining large reserves for federal and state-mandated future landfill capping, closure and post-closure monitoring; household hazardous waste collection and disposal; recycling; planning and education; and County sanitation code enforcement. The County's materials recovery facility, built in response to State waste disposal mandates, represents particularly massive and costly investment. The County has contractually committed 550,000 tons of solid waste per year to the facility for 20 years on a "put-or-pay" basis. Project revenue bond debt of $134 million was issued by the facility owner and is secured principally by the County's annual processing fee.

The County operates the County Disposal System through an "enterprise fund" in which solid waste revenues and expenses are accounted for separately from general funds. Enterprise funds and general fund moneys may not be commingled, and enterprise fund moneys must be raised in amounts which are not less nor more than are sufficient to cover County Disposal System costs. Various contract and debt instruments involving hundreds of millions of dollars in payments have been entered into by the County for County Disposal System purposes secured by the enterprise fund. General county taxes are not legally pledged and will not be available to support such limited resource payment obligations.

IV. A decision invalidating Clarkstown's flow control law would threaten the viability of local governments' sanitation systems and deprive them of any realistic means of managing their waste.

The means by which municipal government pays for public monopoly disposal service is a crucial element of local decisionmaking. San Diego County has chosen the user-fee method, where haulers using the County Disposal System pay user fees at the landfill gate. The system is self-sustaining and not taxpayer supported. Such user fee systems, based on tonnage delivered, encourage recycling and other landfill diversion practices. California law restricts government enterprise funds from charging rates in excess of costs; excesses are deemed taxes requiring voter approval.

County Disposal System costs have increased significantly in recent years owing principally to increased landfill regulatory requirements. The tipping fee charged at the County Disposal System to cover these costs has

risen from $8 per ton in 1987 to $43 per ton presently. Costs of the materials recovery facility and landfill improvements are expected to raise the tipping fee to $67 in 1996.

No solid waste generated in San Diego County has historically left California or the County for disposal. Solid waste has flowed to the County Disposal System on an economic basis, since no feasible alternatives existed and none were more economical given transportation and disposal costs. With the projected increase in the County tipping fee, however, such "economic" flow control will no longer be adequate to assure the disposal of County-generated solid waste at the County Disposal System. Haulers will find out-of-County and out-of-State disposal cheaper, at least episodically. With costs rising and tonnage declining the tipping fee will have to be raised to assure the solvency of the enterprise fund. The more the tipping fee increases, the greater the incentive and potential for evasion. This is known in the public finance industry as the "death spiral".

To prevent such a financial collapse, which would prevent the County from meeting its health and safety objectives, the County must be able to make and rely on flow control laws and agreements to require the continued delivery of County solid waste to the County Disposal System. In the unincorporated area, the County will augment its current hauler permit system and grant franchises to private haulers in order to obligate them to haul waste to the disposal site designated by the County. As to waste generated in the cities in San Diego County, waste supply agreements have been executed by fourteen cities obligating them to cause their franchise haulers to continue to deliver all solid waste to the County Disposal

System. Underpinning the viability of the County Disposal System with "legal flow control" in this manner is critical to avoiding the "death spiral" risk to this critical public asset.

SUMMARY OF ARGUMENT

Petitioners and their *amici* argue for the establishment of a constitutional right to pick-up any and all waste (locally generated and otherwise), sort or "remanufacture" it, bail it, and ship it whenever, wherever and to whomever they choose. The argument is advanced broadly as if there were no difference between state conservation efforts to ration or husband access to private landfills and efforts of local governments to assure safe and healthy disposal of all local waste every step along the way, from pick-up through final disposition.

Petitioners argue that, if a municipal government has elected to fulfill such public health and safety duties by employing "flow control", this Court should overlook public health and safety justifications because such a disposal requirement might also allow the municipality to realize monopolistic economies of scale at the expense of excluded carters. Under this view, invalidity follows no matter the range of possible, financial benefits to the responsible government and no matter how speculative the detrimental impact on interstate commerce. Most importantly, invalidity is claimed even though the local government is directly participating through its ownership of or exclusive control over the aggregating means being employed. A risk-averse local government may

never require use of its own facility because such monopolistic use might occasionally or permanently result in public charges in excess of those for private transportation to out-of-state landfills. Even though local residents bear the burden of such higher charges, petitioners claim that mandatory aggregation in collection and disposal is still unwarranted because it might erode a carter's paramount Commerce Clause right to maximize its own receipt of waste removal payments.

The County respectfully suggests that Clarkstown be afforded, in aid of its good faith attempt to properly fulfill its public health and safety duties, freedom of choice between rational alternatives. These include completely prohibiting others from participation in collecting and disposing of waste and compelling permitted waste haulers to collect, handle, transport and deposit the waste only in approved ways. The most relevant prior decisions of this Court validated public health and safety monopolies for the collection and disposal of waste, based upon an arbitrariness standard according great respect for the public health and safety decisions of state and local governments in lawfully establishing such sanitation monopolies. (*California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905)).

> We perceive no ground to doubt the good faith of the Board of Supervisors; nor can we say that the mode adopted for the suppression of the evils in question was arbitrary or did not have a real, substantial relation to the protection of the public health.
>
> . . . .
>
> The State, charged with the duty of safeguarding the health of its people, committed the subject to the wisdom and discretion of the Board of

> Supervisors. The conclusion it reached appears in the ordinances in question, and the courts must accept it, unless these ordinances are, in some essential particular, repugnant to the fundamental law. (*California Reduction Co.*, 199 U.S. at 320-21).

Numerous localities have long modeled their own safe waste disposal solutions upon the San Francisco and Detroit government monopolies which were previously approved by this Court.

> Courts in literally hundreds of reported cases have upheld the authority of local governments to monopolize and control local garbage collection by eliminating and restraining competition among private collectors. *If any area of the law can be said to be well settled, this one is.* (*Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187, 1192 (6th Cir. 1981); emphasis added).

Nothing in Commerce Clause jurisprudence suggests that such municipal public health and safety monopolies have now somehow fallen outside of the spectrum of good faith alternatives available to the primarily responsible local government. Indeed, decisions before and after 1905 involving analogous direct governmental participation have been held beyond the reach of potential dormant Commerce Clause invalidation.

Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992), *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992) and *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) hold only that neither the responsible state nor local government can prohibit or restrict the disposal of wastes at privately owned landfill sites that were originally generated, collected and shipped elsewhere, at least not without equivalent application to local wastes as well. Nowhere in any

of these decisions is it seriously suggested that there is any "free market" philosophy which would ever justify a judicial veto of a local decision to build a facility designed for disposal of 100% of locally-generated waste, and supported by a legal or contractual requirement that all such waste be disposed of at the facility.

Due respect for the principles of federalism in this quintessentially "local" waste disposal area suggests an enthusiastic vote of confidence in local government. Of course, Congress could retreat from its endorsement of the longstanding federal collective judgment that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies," 42 U.S.C.A. § 6901(a)(4). Until then, however, this Court should continue to entrust at least this much of the problem of waste disposal to those local governments "primarily" responsible for and actually participating in the collection and disposal of such waste.

Anything less invites the burdens and delays of review by injunction of every such local monopolizing governmental decision. Such inordinately expensive inquiries must occur when Congress has acted. But here, Congress has for more than a century totally endorsed the anti-competitive effects of local government public health and safety waste monopolies. This Court has never held these effects barred by the co-extensive reach of the Sherman Act.

The very waste disposal market itself is largely the product of the imposition by local government of lawful disposal duties upon local waste possessors. The same local government participates directly through a public health and safety monopoly in removing and disposing of

the waste. Nothing in the substantially congruent Commerce Clause or Sherman Act jurisprudence compels any "balancing" review of any aspect of these governmental actions. No matter how extreme may be the economic harm to the excluded potential competitor, such harm will never truly outweigh the public health and safety *raison d'être* for establishing the governmental waste monopoly. Alternatively, even under the Court's *Pike v. Bruce Church* balancing test, the Clarkstown flow control system is valid.

ARGUMENT

I. LOCAL GOVERNMENTAL MONOPOLIES HAVE LONG SERVED THE ENDS OF PUBLIC HEALTH AND SAFETY BY REMOVING AND DISPOSING OF IMMEDIATELY DANGEROUS WASTE WITHIN THEIR BORDERS. LONG SETTLED CONSTITUTIONAL PRINCIPLES SUSTAIN SUCH PUBLIC HEALTH AND SAFETY MONOPOLIES DESPITE THEIR ANTI-COMPETITIVE EFFECTS.

Petitioners argue that the "economic protectionism" or "free trading" concept embedded in this Court's Commerce Clause jurisprudence secures to them a right to compete with Clarkstown for waste within its borders, whether generated by Clarkstown's citizenry or otherwise. They argue that no local government could decide to participate directly in the actual delivery of such a concededly essential public health service – timely collection and disposal of municipal waste – without also having to compete directly with private industry in the rendering of such services. No local government can ever be permitted to decide to provide such services with

respect to *all* waste within its borders, unless the decision is justified by *pure* public health reasons, untainted by the specific economic goal or benefit of reducing the overall cost to the host municipality and its taxpayers.

Under petitioners' openly competitive model, local governments must predict the amount of waste to be collected and disposed of under free market forces, size collection fleets and necessary facilities to handle safely such estimates and then let the market forces reign. Should spot market prices surpass those of the public entities, undersized governmental systems could become unable to dispose of waste for which they did not plan. Unlike the government, private carters remain free to elect *not* to collect and dispose of waste when profits are unavailing. Episodic withdrawals of the private sector leave all risk to the public, whose workforce and facilities may not be capable of handling such abandoned waste. Early decisions sizing municipal plants and workforces for 100% of all predicted waste would go far to prevent such a lack of capability. But the inability to control waste flow would soon render uneconomic such oversized facilities and thereby inflict substantial economic harms upon the public. No prior decision of this Court suggests in any way that a risk-averse local government cannot avoid such harms by a decision to compel collection and disposal of *all* waste within its borders.

A. Governmental public health monopolization of the disposal of solid waste was long ago constitutionally validated by this Court. The disease avoidance reason remains wholly unchanged and current.

Historically, public health monopolizing decisions have often been thought necessary for a local government to attract private capital to assist it in providing such an essential public service. Indeed, municipal grants or awards of waste collection and disposal monopolies have long had an honorable place in the history of waste disposal. *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905) and *Gardner v. Michigan*, 199 U.S. 325 (1905) each upheld injunctions enforcing municipal awards of exclusive collection and disposal monopolies over competitors claiming "due process" objections and correlative rights either to continue competing or to be compensated for such an alleged taking of their private property for public use. This Court's ninety-year-old understanding and description of the dimensions of the municipal collection and waste disposal challenge, the chosen monopolization solution and the carters' claims remains wholly current and incisive:

> [T]he municipal authorities might well have doubted whether the substances that were *per se* dangerous or worthless would be separated from such as could be utilized and whether the former would be deposited by the scavenger at some place that would not endanger the public health. They might well have thought that the safety of the community could not be assured unless the entire mass of garbage and refuse, constituting the nuisance, from which the danger came, was carried to a crematory where it could be promptly destroyed by fire; and thus

> minimize the danger to the public health. (*California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. at 323).

California Reduction and *Gardner* remain as compelling and persuasive as ever. Recently *Hybud Equipment Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981) rejected efforts identical to petitioners', to distinguish *California Reduction* and *Gardner*:

> The plaintiffs and the American Paper Institute argue, however, that the increased value of wastes and the City's appropriation of that value render the old cases anachronisms that should be set aside. They argue that changed economic circumstances and heightened environmental concern make separating and selling such recyclable wastes as metal, paper and cardboard more feasible now than in the past. They point out that there now exist competitive markets for recyclable wastes. They argue that Akron's purpose in acquiring a monopoly over garbage is not public health, as was the purpose in the old cases, but rather making its energy plant more profitable by insulating it from competition for raw materials. A monopoly imposed for that purpose, they argue, is neither necessary nor efficient.
>
> *The old cases are not anachronisms. They are not distinguishable on any of these grounds. The solid waste disposal problem is as serious today for cities as in the past, perhaps more serious.*
>
> . . . .
>
> Neither does the fact that the City appropriates the value and sells some of the recyclable waste, or chooses in manufacturing energy to burn some of the paper and cardboard rather than to resell it, distinguish the old cases. *Under these cases, the City could simply have taken over all garbage collection as in San Francisco, Detroit and*

Cincinnati, depriving existing collectors of any business at all.

. . . .

In each of the cases discussed above the city granted a monopoly right to collect garbage to a single company, permitting that company alone to engage in a profitable business that had previously been done by several firms. The courts held that the public interest in regulation of garbage was so great that monopolization of the service and the attendant transfer of profits did not violate the taking or due process clause. (*Hybud*, 654 F.2d at 1193-94; emphasis added).

The County respectfully submits that adherence to these municipal waste precedents is both necessary and advisable. For example, while the last bubonic plague outbreak occurred in Los Angeles in 1924, the danger "is still a threat in several Western States, including New Mexico, Arizona, Colorado, California and Oregon." (*All Things Considered*, (NPR broadcast, June 13, 1993), *available in* LEXIS, Nexis Library, CURRNT File; Paul D. Hoeprich, M.D. & M. Colin Jordan, M.D., *Infectious Diseases* 1305 (4th ed. 1984) ("The primary preventive or suppression measures against urban plague consists of *rigorous environmental sanitation* aimed at reducing or eliminating commensual rodent populations, particularly rats and their fleas." (emphasis added)); Alan M. Barnes, *Zoologic Society of London: Surveillance and Control of Bubonic Plague in the United States* 237 (*reprinted by* U.S. Dep't of Health and Human Servs., Pub. Health Serv. No. 50, 1982); Bernard C. Nelson et al., *The Complexities at the Interface Among Domestic/Wild Rodents, Fleas, Pets and Man in Urban Plague Ecology in Los Angeles, County, California*, Proceedings Twelfth Vertebrate Pest Conference, Univ. of California, Davis 88 (1986)). Prevention of disease is the

continuing, core reason for reaffirming the validity of *California Reduction* and *Gardner*.

B. The receipt of financial benefits by actively participating local governmental public health monopolies does not render them subject to Commerce Clause review.

Throughout our history local governmental monopolies have regularly been used to attract private capital to public ends. Much of what is now referred to as infrastructure was originally built and operated through such municipal monopoly grants, monopolies which both competitors and paying customers regularly and broadly attacked as unconstitutional. (*E.g.*, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); *Hutcheson v. City of Valdosta*, 227 U.S. 303 (1913); *District of Columbia v. Brooke*, 214 U.S. 138 (1909); *Ouachita Packet Co. v. Aiken*, 121 U.S. 444 (1887); *Morgan's Steamship Co. v. Louisiana Bd. of Health*, 118 U.S. 455 (1886); *Transportation Co. v. Parkersburg*, 107 U.S. 691 (1882); *Packet Co. v. Catlettsburg*, 105 U.S. 559 (1881)). None of the wide-ranging full scale constitutional assaults on the anti-competitive effects of such municipally established monopolies ever succeeded in overcoming a public health and safety justification.

> "Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all," says Chancellor Kent, "be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be

made subservient to the general interests of the community."

. . . .

In *Gibbons v. Ogden*, Chief Justice Marshall, speaking of inspection laws passed by the States, says: "They form a portion of that immense mass of legislation which controls everything within the territory of a State not surrendered to the General Government – all of which can be most advantageously administered by the State themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts." (*Slaughter-House Cases*, 83 U.S. (16 Wall.) at 62-63 (citations omitted)).

No such monopoly case ever held that indisputably strong public health and safety legislative purposes are overridden by detrimental impacts upon interstate commerce. Indeed, *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) suggested that "balancing" may not even be necessary when dealing with the public health and safety, i.e. "We are not, then, dealing here with 'state legislation in the field of *safety* where the propriety of local regulation has long been recognized.' " (*Id.* at 143 (citation omitted)). These same decisions uniformly held that such government public health monopolies, quintessentially in "works and improvements of a local character", were substantially impervious to review by the federal courts under the Commerce Clause.

> In all such cases of local concern, though incidentally affecting commerce, we have held that the courts of the United States cannot, as such, interfere with the regulations made by the State, nor sit in judgment on the charges imposed for the use of improvements or facilities afforded,

> or for the services rendered under state authority. It is for Congress alone, under its power to regulate commerce with foreign nations and among the several states, to correct any abuses that may arise, or to assume to itself the regulation of the subject. (*Ouachita Packet Co. v. Aiken*, 121 U.S. 444, 447-48 (1887)).

The financing of these local public health and safety solutions necessitated and justified their monopolizing features. For example, the requirement that Ohio river steamers *exclusively* use the town wharf, instead of the river bank within its borders, was upheld as a coercive municipal monopoly permissible under the Commerce Clause. (*Packet Co. v. Catlettsburg*, 105 U.S. 559 (1881)). More recently, *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), upheld local airport charges through the application (citing *Parkersburg* and other such cases) of the financing considerations which ultimately justify this principle.

> We therefore regard it as settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed upon interstate and domestic users alike. (*Id.* at 714).

These settled Commerce Clause principles have long been relied upon by many local governments in establishing monopolies to carry out their public duties including especially monopolies in the collection and disposal of waste. The County respectfully suggests that while time has passed, the dangers have not, and therefore a different result is unwarranted.

II. NOTHING IN THE COURT'S RECENT PRIVATE LANDFILL DECISIONS SUGGESTS ANY ALTERATION OF THE CONSTITUTIONAL PRINCIPLES PREVIOUSLY VALIDATING GOVERNMENTAL WASTE MONOPOLIES.

The recent decisions of this Court invalidating efforts to conserve local disposal space by excluding out-of-state waste do not diminish in any way the traditional force accorded to the public health or financing needs underlying "flow control" monopolization by the local waste collecting and disposing jurisdiction. None of the values animating these decisions is impaired in any way by the continued validation of municipal collection and disposal monopolies.

Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992), *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992) and *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), invalidated laws discriminatorily restricting access to privately owned landfills to local residents only unless special permissions were obtained or special fees paid. These landfills had previously served both their host communities and out-of-state exporting communities. The receiving governments argued that their closure laws were justified by long term conservation considerations rather than immediately threatening public health concerns. None of these cases had anything to do with a health and safety decision by a principally responsible government actively engaged in the collection and disposal of solid wastes. Moreover, each case either reserved decision on the point of or explicitly suggested that the opposite conclusion would have resulted had there been any imminent public health or safety basis for even a

discriminatory decision. (*Philadelphia v. New Jersey*, 437 U.S. at 628-29 ("There has been no claim here that the very movement of waste into or through New Jersey endangers health. . . . "); *Fort Gratiot Sanitary Landfill, Inc.*, 112 S. Ct. at 2027 ("Of course, *our conclusion would be different* if the imported waste raised health or other concerns not presented by Michigan waste." (emphasis added)); *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. at 2015 ("There is absolutely no evidence before this Court that waste generated outside Alabama is more dangerous than waste generated in Alabama. . . . ")).

Clarkstown's decision to centralize waste collection through a single facility was based on compelling health and safety evidence aired at a public hearing (J.A. at 34-68), and the equally compelling planning necessity to carry out that decision through a non-discriminatory monopolizing requirement which limited the potentially harmful waste to that single location. Here, therefore, there is little basis for condemning the Town's decision on the basis of the Court's prior rejection of long-term conservation as an acceptable rationale for placing all burdens on out-of-state interests.

Although Clarkstown's monopoly offers possible financial advantage through bulk purchase of transportation and landfill services, there is nothing in any of these landfill conservation decisions which suggests that any such financial benefit would ever render *bona fide* public health and safety monopolies subject to dormant Commerce Clause invalidation. Indeed, *Philadelphia v. New Jersey* and *Fort Gratiot* each expressly disclaimed an expression of opinion as to the appropriateness of actions taken by receiving municipalities to conserve their own

facilities. (*Philadelphia v. New Jersey*, 437 U.S. at 627-628 n.6; *Fort Gratiot Sanitary Landfill, Inc.*, 112 S. Ct. at 2023).

In the final analysis, these cases only teach that the burden of conserving a shrinking disposal resource must not be placed entirely on out-of-state interests. The discriminatorily priced access and total exclusion of outside waste evaluated in these prior decisions left the burden on out-of-state users. Thus, a benefit was transferred to in-state users who were not shown to have used public resources on behalf of the privately owned landfill businesses in furtherance of the particular conservation policy under scrutiny.

A. The market participant doctrine independently supports the propriety of reaffirming *California Reduction* and *Gardner* and their *per se* validation of municipal waste monopolies.

The market participant doctrine serves as an independent basis for the *per se* validation of flow control laws enacted by a responsible local government where it is actively participating in the collection and disposal of municipal solid waste through monopolistic controls having both public health and public finance benefits. (*Wyoming v. Oklahoma*, 112 S. Ct. 789 (1992); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976)). The County respectfully suggests that this rule is wholly consonant with *California Reduction* and *Gardner* and should now expressly be extended to include municipal solid waste monopolies.

A government's investment of time, effort and funds in such an integral operation as sanitary waste disposal

presents a most compelling need for the freedom to exclude competition in an effort to protect the public fisc through non-discriminatory user fees designed to pay for that investment. The older monopoly cases repeatedly upheld such exclusivity choices for essentially the same "sovereignty" reasons as ultimately underlie recent market participation cases. If the State may control use of its own cement plants, it would seem that more flexibility, not less, should be accorded it in making financial commitments to carry out operations in more traditional health and safety areas. (*White*, 460 U.S. 214-215). The monopolizing requirement here at issue has had a long and honorable history of effective use in facilitating a most necessary governmental task.

Nothing in the market participation cases suggests inapplicability to Clarkstown's municipal disposal monopoly and the five year put-or-pay financing commitment which it made to the operator of its transfer facility. If sufficient waste is produced annually, no direct Clarkstown payments will be required; if insufficient, Clarkstown must pay. Such financing guarantors participate in most marketplaces. Governmental assurances of performance are often necessary to induce construction lenders to advance funds to build facilities.

Swin Resources Systems, Inc. v. Lycoming County, 883 F.2d 245 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990) upheld a local county's market participant status in the operation of its landfill. And, while there are some differences, of course, between a local government's operation of its transfer station and its landfill, the more meaningful similarities would seem to favor a market participation conclusion for the former. Purely as a commercial

matter, the aggregation of waste affords Clarkstown possible economies of scale in purchasing transportation and landfill services. Such vital trading advantages were recognized in *J. Filiberto Sanitation v. Department of Environmental Protection*, 857 F.2d 913 (3d Cir. 1988):

> The transfer station is the county's only disposal facility. As such it is irreplaceable. As a centralized depository, it is the basis of the county's ability to plan and execute long- and short-term disposal arrangements. As such, it is indispensable. (*Id.* at 922).

The County respectfully submits that the basic reason for the rule embodied in this Court's market participation decisions wholly justifies its application to the Clarkstown participation in waste collection and disposal through its transfer station, its financially sustaining put-or-pay commitment and the chosen "flow control" means of fulfilling it.

B. This Court's prior *per se* immunization of municipal sewer monopolies under the Sherman Act is consistent with a declination to now require balancing inquiries under the Commerce Clause.

Because the ultimate goals being served by both Sherman Act and dormant Commerce Clause jurisprudence are the same, this Court's *per se* immunization in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) of municipal sewer monopolies under the Sherman Act should support, by analogy, a consistent *per se* immunity under the Commerce Clause. If a court should hesitate to uphold *per se* immunity under the Sherman Act for some government business monopolies not presenting genuine safety and health needs (see, e.g. *Community Communications Co. v. Boulder*, 455 U.S. 40 (1982)), it should be

equally hesitant under the Commerce Clause; in both cases the need for a rule of reason type of balancing inquiry with all of its attendant transaction costs may be justified by the more detailed and comprehensive economic understandings potentially available.

Here New York State has indisputably authorized Clarkstown to impose "appropriate and reasonable limitations" on "competition" by requiring "that *all* solid waste" no matter its origins "shall be delivered to a specified" facility. (Rockland County – Solid Waste Treatment and Disposal Act, ch. 569, McKinney's 1991 Laws of New York, p. 1072.) Clarkstown's wholly authorized equitable ownership and exclusive use of the facility should be more than sufficient to make it such a constitutionally valid "actor" within the meaning of the federalism concepts which underlay sovereign immunity under the Sherman Act. (*Parker v. Brown*, 317 U.S. 341 (1943); *Olsen v. Smith*, 195 U.S. 332 (1904); *Hybud Equip. Corp. v. City of Akron*, 742 F.2d 949 (6th Cir. 1984)).

III. LOCAL GOVERNMENT WASTE MONOPOLIES ARE VALID WHEN BALANCED UNDER THE *PIKE V. BRUCE CHURCH* TEST

Even if municipal waste disposal systems are not validated on the ground of a municipal waste disposal *per se* exception to dormant Commerce Clause invalidation, or on the basis of the market participant doctrine, they are still valid under a *Pike v. Bruce Church* analysis. Flow controls are challenged as export restrictions on a par with, or are the "flip side" of, the import restrictions struck down by this Court in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). In fact, Clarkstown does not bar the export of solid waste. Clarkstown requires that

solid waste first be brought to a town-operated transfer facility; after delivery export out of state is not only possible, but is intended. The Clarkstown ordinance regulates even-handedly; it neither precludes the entry nor the departure of waste from the jurisdiction *as such*.

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its efforts on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. (*Pike v. Bruce Church*, 397 U.S. 137 (1970)).

Dormant commerce clause challenges to local government solid waste regulation span a wide variety of solid waste systems across the country. Flow control in Clarkstown requires the delivery of waste to a designated site; exportation outside the county is not prohibited. Fundamentally, however, interstate commerce is not being discriminated against.

Here, petitioners actually objected to Clarkstown's enactment of the challenged local regulation; however, because they constitute in-state and local interests their claim for protection is necessarily weak. (Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425 (1982)).

The lack of identifiable adverse consequences to interstate commerce, incidental or otherwise, suggests a speculative burden on interstate commerce that should not be deemed to override indisputably substantial local interests. (*Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981) (held that burden on out-of-state plastics manufacturer was outweighed by state's solid waste disposal interest in banning use of plastic non-returnable milk containers); *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346, 353 (1939) (upheld in-state price

control as applied to exports to an out-of-state purchaser)).

What is critical in this case, therefore, is that the local benefits in terms of safety, health, the environment and fiscal well-being are clearly substantial. The Clarkstown transfer facility may even speed the ultimate entry of waste into interstate commerce. Such incidental or marginal effects on interstate commerce produced by regulation directed almost entirely to internal public health and safety concerns should be held insufficient for invalidation under the dormant Commerce Clause.

CONCLUSION

In matters of local public health and safety, such as waste disposal, local sovereignty should normally result in the judicial validation of the establishment of local government monopolies.

Fundamentally powerful federalism principles counsel against petitioners' requests to extend this Court's three private landfill conservation decisions backwards to the local government ultimately responsible for collecting and disposing of the waste. Here, literally thousands upon thousands of *bona fide* local monopolizing judgments are constantly being made and adjusted in response to the ever-changing local waste disposal needs. Such acts need not discriminate between states. Private disappointed expectancy claims, like petitioners', will be ubiquitous unless limited to prosecution on other than dormant Commerce Clause grounds. The County of San Diego respectfully commends to this Court that it create a *per se* safe-harbor where local government waste monopolies may operate free of any duty to subordinate their

governmental functions to those of interstate carters. Similarly, the Court could implement these concerns by validating local government waste monopolies under the market participant doctrine or the *Pike v. Bruce Church* balancing test.

For these reasons, the decision below should be affirmed.

Respectfully Submitted,

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